THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2020-0110

Petition of New Hampshire Division for Children, Youth and Families

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APPEAL PURSUANT TO RULE 11 FROM A JUDGMENT OF THE 10TH CIRCUIT—FAMILY DIVISION—PORTSMOUTH

BRIEF FOR THE NEW HAMPSHIRE DIVISION FOR CHILDREN, YOUTH, AND FAMILIES

THE STATE OF NEW HAMPSHIRE

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(oral argument)

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ISSUES PRESENTED

I. Whether the family court lacked subject matter jurisdiction to join DCYF as a party in a private guardianship case and order DCYF to provide services because:

a. No statute provided the family court—a court of limited subject matter jurisdiction—with the authority to do so; and

b. Sovereign immunity barred the family court's actions.

DCYF's Motion to Reconsider, A. 29-31; Hearing on Motion to Reconsider, Tr. 3-6, 8-9.

II. Whether the family court violated Part I, Article 37 of the New Hampshire Constitution (separation of powers) by joining DCYF as a party in a private guardianship case and ordering DCYF to provide services because in doing so, the court usurped essential powers of the executive branch to (a) decide the State's interest in civil litigation, and (b) expend public funds. DCYF's Motion to Reconsider, A. 29-31; Hearing on Motion to Reconsider, Tr. 3-6, 8-9.

PROVISIONS OF CONSTITUTION AND STATUTES INVOLVED

Part I, Article 37 of the State Constitution:

> In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

Part II, Article 56 of the State Constitution

> No moneys shall be issued out of the treasury of this state, and disposed of ... but by warrant under the hand of the governor for the time being, by and with the advice and consent of council, for the necessary support and defense of this state, and for the necessary protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court.

RSA 170-G:4, II

> The department [of health and human services] shall have the power and duty to:
>
> II. Provide, through social workers, services for all children and youth referred to it by the probate and district courts pursuant to RSA 169-C; 170-B; 170-C; and 463 and for all children and youth who are at risk of placement with the department in connection with child abuse or neglect.

STATEMENT OF THE CASE AND FACTS

DCFY challenges two orders issued by the family court in a private guardianship matter: *In the Matter of B.B.*, Case Number 670-2017-GM-00030. Prior to the first order, issued on September 10, 2019 Order, DCYF had not been a party to the guardianship case, and there existed no other juvenile proceeding affecting the minor. B.B.'s guardians are her maternal grandparents, and her father has visitation rights. The father has been frustrated by his lack of parenting time with B.B. and wants more independence parenting his daughter, but the guardians believe he is unable to care for B.B.'s special needs. A.[1] 26.

On September 10, 2019—with no prior notice to DCYF—the family court (*Hall*, J.) issued an order joining DCYF as a party to the case, and ordering DCYF "to provide the services of a parent aid to supervise visits between father and [B.B.] on a weekly basis for 8 hours per week." A. 28. In addition, the court ordered DCYF "to provide father with such other supports as may be necessary to facilitate future expansion of father's parenting time, including overnight visits." *Id.* The court cited RSA 170-G:4, II as authority for its decision to join DCYF to the case and to order DCYF to provide services to the father. *Id.*

DCYF filed a motion to reconsider, arguing that the court lacked authority to join it as a party to a private guardianship case where the minor child at issue is not subject to any juvenile

[1] "A." refers to the appendix to this brief; "Tr." refers to the transcript of the Hearing on Motion to Reconsider held on January 29, 2020.

proceeding under RSA 169-C, 170-B, or 170-C, and DCYF is not a guardian of the child under RSA 463. A. 29-31. DCYF further argued that the court lacked authority to order DCYF to provide services in the context of this private family dispute. *Id*.

On January 29, 2020, the court (*Pendleton*, J.) held a hearing on DCYF's motion for reconsideration. Counsel for DCYF argued that the family court lacked jurisdiction to order DCYF to provide services in this private guardianship matter in order to ameliorate a disagreement between two private parties. Tr. 3-6, 8-9. DCYF pointed out that "if it was authorized by statute and there were resources behind it, then the resources of DCYF might be helpful to this particular situation," but that "this is, basically, a custody battle." Tr. 8. The court acknowledged that DCYF has "limited resources to provide to families," Tr. 10, and that the ruling in this case could "really shake the system," Tr. 11, and "open[] a door to a huge new area or orders that [DCYF] . . . do[es]n't have resources to meet," Tr. 12. However, the court disagreed with DCYF's interpretation of RSA 170-G:4, II as not authorizing the court to order DCYF to provide services in this case. Tr. 10.

On the same day as the hearing, the court issued an order denying DCYF's motion to reconsider. A. 33-35. The court again relied on RSA 170-G:4, II, stating that the orders in the case raised "concern with the child's current safety." A. 34. The court further explained that it "joined" DCYF to the case as a means of "allowing the Division input into the case," and because the court believed the child "may be at risk of placement with the 'Department.'" A. 34-35. In addition to requiring DCYF to provide the services initially ordered, the court further required DCYF to provide a

"report" with "copies of the parenting supervision records," and asked DCYF "to perform its analysis as if the case had been referred to it . . . ." A. 35.

DCYF filed this Petition for Original Jurisdiction seeking a writ of prohibition preventing the family court from joining DCYF as a party to this private guardianship proceeding and ordering DCYF to perform these tasks and expend public resources.

SUMMARY OF THE ARGUMENT

The family court lacked jurisdiction to join DCYF as a party to a private guardianship case and order it to provide services because (1) no statute provided the family court authority to do so, and (2) sovereign immunity barred the court's actions. The family court's interpretation of RSA 170-G:4, II as permitting the court to join DCYF to this case and order it to expend public funds to resolve a purely private dispute could subject the State to an entirely new, and likely high volume, of cases that the legislature, the sole body permitted to waive sovereign immunity, never intended nor authorized. In addition, by joining DCYF as a party and ordering DCYF to provide services to a child not under state supervision, custody, or guardianship, the court usurped the essential powers of the executive branch to decide the State's interest in civil litigation and to expend public funds.

ARGUMENT

I. DCYF IS ENTITLED TO A WRIT OF PROHIBITION.

Prohibition is proper "to prevent a tribunal possessing judicial or quasi-judicial powers from exercising jurisdiction over matters not within its cognizance or exceeding its jurisdiction in matters of which it has cognizance." *Petition of Mone*, 143 N.H. 128, 132 (1998) (quoting 63C Am.Jur.2d *Prohibition* § 1, at 6 (1997)). "Prohibition is an extraordinary remedy which, although within the discretion of this court, is used with caution and forbearance and only when the right to relief is clear." *Id.* (quoting *State v. Superior Ct.*, 116 N.H. 1, 2 (1976)). As discussed below, the family court lacked jurisdiction to join DCYF as a party to a private guardianship matter and order it to provide services. DCYF's right to relief is clear and the need for immediate relief urgent. This court should issue a writ of prohibition preventing the family court from *sua sponte* ordering a non-party state agency to become a party to a civil action, perform various tasks, and expend financial resources.

II. THE FAMILY COURT EXCEEDED ITS LIMITED JURISDICTION BY JOINING DCYF AS A PARTY TO A PRIVATE GUARDIANSHIP MATTER AND ORDERING DCYF TO PROVIDE SERVICES.

"Subject matter jurisdiction is jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things." *In Matter of Ball*, 168 N.H. 133, 140 (2015) (quoting *Hemenway v. Hemenway,* 159 N.H. 680, 683

(2010)). "Subject matter jurisdiction constitutes a tribunal's authority to adjudicate the type of controversy involved in the action." *Id.* (quotation omitted). "Absent subject matter jurisdiction, a court order is void." *Id*. quotation omitted). "A party may challenge subject matter jurisdiction at any time during the proceeding, including on appeal, and may not waive it." *Id.* (quotation omitted). "A court lacks power to hear or determine a case concerning subject matters over which it has no jurisdiction." *Id.* (quoting *In the Matter of Muller & Muller,* 164 N.H. 512, 516–17 (2013)). This court reviews, *de novo,* whether a trial court had subject matter jurisdiction. *Id.*

The family court lacked jurisdiction to join DCYF as a party to the case and order it to provide services because (1) no statute provided the family court authority to do so, and (2) sovereign immunity barred the court's actions.

A. No Statute Provides The Family Court With Authority To Join DCYF To A Private Guardianship Case And Order It To Provide Services.

"The family division is a court of limited subject matter jurisdiction," with powers "limited to those conferred by statute." *In re Mallett*, 163 N.H. 202, 207 (2012). Because guardianships are statutory, the "[c]ourt has only such power in this field as is granted by statute." *See Taylor v. Taylor*, 108 N.H. 193, 194 (1967) (discussing the field of divorce). Therefore, determining the jurisdiction of the family court is a matter of statutory interpretation which this court reviews *de novo*.

See Rogers v. Rogers, 171 N.H. 738, 743 (2019).

When interpreting a statute, this court first examines the language found in the statute and where possible, ascribes the plain and ordinary meanings to words used. *Maldini v. Maldini*, 168 N.H. 191, 194–95 (2015). "When a statute's language is plain and unambiguous, [the court] need not look beyond it for further indications of legislative intent." *Id.* "Courts can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include." *Id.* This court "interpret[s] statutes not in isolation, but in the context of the overall statutory scheme." *Id.*

The circuit court has exclusive jurisdiction over "the appointment of a guardian of the person or of the estate or of both of any minor." RSA 463:4, I; RSA 490-F:3 (granting the circuit court the jurisdiction, powers, and duties conferred upon the former probate court). The State only submits to the jurisdiction of the family court under RSA 463 in cases where the State accepts appointment as guardian of the minor. *See* RSA 463:18 ("By accepting appointment as guardian, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person.").

The purpose of RSA 463, with respect to guardianships of the person of a minor, is "to secure for a minor an environment of stability and security by providing for the appointment of a guardian of the person when such appointment is in the best interests of the minor." RSA 463:1. A guardianship petition must set forth, among other things, "[t]he existence of any pending adoption, juvenile proceedings, including those pursuant to RSA 169-B, 169-C, 169-D, or 170-C, or other pending proceedings

affecting the minor or the parents of the minor . . . ." RSA 463:5, IV(c). In addition, the petition must state "[w]hether guardianship is being sought by the department [of health and human services] as part of the permanent plan for a child in the department's custody pursuant to the Adoption and Safe Families Act of 1997 . . . ." RSA 463:5, IV(d). If the petition identifies any juvenile proceeding affecting the minor, then the Department of Health and Human Services (DHHS) must receive notice of the proceeding by first class mail. RSA 463:6. If the minor is not subject to any juvenile proceeding—as in the instant case—then DHHS does not receive any notice of the guardianship proceeding and does not participate in what is a purely private matter.

Nothing in RSA 463 authorizes the family court to join the State as a party to a private guardianship case. *See, generally*, RSA 463. In the absence of express legislative authorization, the family court has no jurisdiction to join the State and order it to provide services in a purely private matter. *See In re Muller*, 164 N.H. 512, 519 (2013) (holding that "[i]n the absence of express legislative authorization, the family division has no jurisdiction to determine the validity of a third party's interest in the parties' marital property.").

The family court's reliance on RSA 170-G:4, II as authority to join DCYF and order it to provide services in a private guardianship case is misplaced. That statute—which is not referenced anywhere in the guardianship statute, *see generally* RSA 463—provides:

> The department [of health and human services] shall have the power and duty to:

> II. Provide, through social workers, services for all children and youth referred to it by the probate and district courts pursuant to RSA 169-C; 170-B; 170-C; and 463 and for all children and youth who are at risk of placement with the department in connection with child abuse or neglect.

RSA 170-G:4, II.

RSA chapter 170-G relates to services provided by the State to children, youth and families. RSA 170-G:3 sets forth the powers and duties of the commissioner of DHHS with respect to such services, and RSA 170-G:4 sets forth the powers and duties of DHHS with respect to such services. Both statutes address powers and duties granted to DHHS and its commissioner, not the circuit court. To the extent RSA 170-G:4, II mentions the probate and district courts, it expressly references the statutory chapters governing the circuit court's jurisdiction with respect certain statutory proceedings involving children and youth, including guardianships matters. Nothing in RSA 170-G:4, II purports to extend the circuit court's jurisdiction beyond that set forth in the referenced statutory schemes.

At most, RSA 170-G:4, II could be interpreted as recognizing that the family court can refer a child or youth to DHHS if the court is concerned that the child may be at risk of abuse or neglect. *See* Tr. 4-5 (DCYF counsel explaining the typical process by which DCYF receives referrals from the circuit court arising out of guardianship proceedings). Upon receiving such a referral, DCYF would commence an investigation pursuant to RSA 169-C:34. *See* Tr. 5. Based on the results of that investigation, DCYF would decide what avenue is best to address possible harm to the child. If there is sufficient evidence to substantiate a finding of

abuse or neglect of the child, DCYF may file a petition under RSA chapter 169-C. In the alternative, DCYF "may offer voluntary services to families without making a determination of the person or persons responsible for the abuse or neglect." RSA 169-C:34, V. In any event, it is DCYF—not the family court—that is charged with the responsibility of investigating reports of abuse and neglect and determining the "protective treatment, and ameliorative services that appear necessary to help prevent further child abuse or neglect and to improve the home environment and the parents' ability to adequately care for the child[]." RSA 169-C:34, II(e).

Because no statute confers on the family court the authority to join the State as a party to a private guardianship case and order the State to provide services, the family court exceeded its jurisdiction in doing so.

B. Sovereign Immunity Bars The Family Court From Joining DCYF As A Party And Ordering It To Provide Services.

"Sovereign immunity protects the State itself from suit in its own courts without its consent . . . ." *Conrad v. N.H. Dep't of Safety*, 167 N.H. 59, 69 (2014) (quoting *Everitt v. Gen. Elec. Co.*, 156 N.H. 202 (2007)). "As a State agency, DCYF is cloaked with the State's sovereign immunity." *Chase Home for Children v. N.H. Div. for Children, Youth & Families*, 162 N.H. 720, 730 (2011). Accordingly, DCYF is "immune from suit in New Hampshire courts 'unless there is an applicable statute waiving immunity.'" *XTL-NH, Inc. v. New Hampshire State Liquor Comm'n*, 170 N.H. 653, 656 (2018) (quoting *Chase Home*, 162 N.H. at 730). "Any statutory waiver is limited to that which is articulated by the legislature;

thus, New Hampshire courts lack subject matter jurisdiction over an action against the State 'unless the legislature has prescribed the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.'" *Id.* (quoting *Lorenz v. N.H. Admin. Office of the Courts*, 152 N.H. 632, 634 (2005)). "Sovereign immunity is a jurisdictional question not to be waived by conduct or undermined by estoppel." *Id.* (quoting *LaRoche, Adm'r v. Doe*, 134 N.H. 562, 566 (1991)).

As discussed above, no statute authorizes the family court to join DCYF as a party to a private guardianship case and order it to expend public funds to provide services to the parties. Unlike RSA chapters 169-B, 169-C, and RSA 169-D—each of which include a provision expressly authorizing the circuit court to order DCYF to provide and pay for services in the context of those proceedings, *see* RSA 169-B:40, RSA 169-C:27, and RSA 169-D:29—nothing in RSA chapter 463 authorizes the family court to order DCYF to provide and pay for services in a guardianship proceeding. *See generally* RSA chapter 463.

The doctrine of sovereign immunity "serves two general public policy considerations: the protection of the public against profligate encroachment on the public treasury, and the need for the orderly administration of government . . . ." *Lorenz*, 152 N.H. at 632 (quoting *Estate of Raduazo*, 148 N.H. 687, 692 (2002)). By ordering DCYF to provide services in the context of this private family dispute, the family court is requiring DCYF to divert crucial resources away from parents who are at risk of losing their parental rights due to findings of abuse and neglect. The court's order squarely disrupts the orderly administration of government and requires the expenditure of State funds. DCYF will

effectively lose its immunity if it is forced to provide services to private parties when its services are in high demand by parents seeking to reunify with children in state custody.

Because no statute authorizes the family court to require DCYF to provide and pay for services in a private guardianship case, sovereign immunity bars the family court's directives to DCYF in this case.

III. THE FAMILY COURT VIOLATED PART I, ARTICLE 37 OF THE NEW HAMPSHIRE CONSTITUTION BY USURPING THE ESSENTIAL POWERS OF THE EXECUTIVE BRANCH TO DECIDE THE STATE'S INTEREST IN LITIGATION AND TO EXPEND PUBLIC FUNDS.

"The separation of powers between the legislative, executive and judicial branches of the government is an important part of [our] constitutional fabric." *Petition of Mone*, 143 N.H. 128, 133–34 (1998). Part I, Article 37 of the New Hampshire Constitution provides:

> In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

This court has "long acknowledged that the complete separation of powers would interfere with the efficient operation of government, and that consequently there must be some overlapping of the power of each branch." *In re Opinion of Justices*, 162 N.H. 160, 165 (2011) (quotation and citation omitted). "Nonetheless, while, as a practical matter, there must be some

overlapping among the three branches of government, the New Hampshire Separation of Powers Clause is violated when one branch usurps an essential power of another." *Id.* at 165-66.

The power to execute laws is one of the executive branch's "essential powers." *Id*. at 166; N.H. Const., pt. II, art. 41. It is the executive "in which the constitution vests the 'supreme executive' authority to determine whether it is in the public interest to litigate a particular matter." *Id.* at 170. "The executive branch alone has the power to decide the State's interest in litigation." *Id.* By ordering DCYF to join as a party to this private guardianship case, the family court usurped the executive branch's exclusive power to decide whether to join the State as a party to litigation. *See id.* at 173 (holding that legislative bill, which removed from the executive branch the decision whether to join the State as a party to a particular civil litigation, usurped the executive branch's power to execute and enforce the law).

By ordering DCYF to provide services in the context of this private family dispute, the family court's order also usurped the executive branch's essential power to determine how to spend state revenue. The New Hampshire Constitution specifically vests the power to spend state revenue in the executive branch. *New Hampshire Health Care Ass'n v. Governor*, 161 N.H. 378, 393 (2011). Part II, Article 56 provides:

> No moneys shall be issued out of the treasury of this state, and disposed of . . . but by warrant under the hand of the governor . . . by and with the advice and consent of council, for the necessary support and defense of this state, and for the necessary protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court.

"The purpose of Part II, Article 56 is to grant the Governor the power to ensure that no payments . . . be made from the public treasury except for public purposes and in accordance with the law." *New Hampshire Health Care Ass'n*, 161 N.H. at 387 (quotation marks and citation omitted). "The Governor's constitutionally vested spending power must include the exercise of discretion . . . to avoid wasteful expenditures in circumstances where the social purposes of the underlying legislation are not compromised." *Id.* at 390.

In this case, the family court ordered DCYF to use public funds for the benefit of private parties who have not been assessed by DCYF and determined to be in need of public services. The minor has not been found to be abused or neglected, is not in an out-of-home placement, and has not been found to be at any risk of placement. Requiring DCYF to expend public funds in the context of private litigation diverts limited resources away from parents who rely on those services to assist them in reunifying with their children following findings of abuse and neglect. "Due to the simple fact that State resources are limited, DCYF may reasonably direct how funds are expended." *In re Ryan G.*, 142 N.H. 643, 646 (1998) (citing *Petition of Strandell*, 132 N.H. 110, 119–20 (1989)). By ordering DCYF to provide services in the context of this private family dispute, the family court usurped the executive branch's essential power to direct the spending of state revenue.

For all of the foregoing reasons, DCYF requests that the court issue a writ of prohibition preventing the family court from asserting its jurisdiction over DCYF in the context of this private guardianship case.

CONCLUSION

For the foregoing reasons, the DCYF respectfully requests that this court issue a writ of prohibition preventing the family court from ordering DCYF to become a party to this private guardianship matter, perform various tasks, and expend financial resources.

DCYF requests a fifteen-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
DIVISION FOR CHILDREN, YOUTH AND FAMILIES

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June 9, 2020

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CERTIFICATE OF COMPLIANCE

I, Laura Lombardi, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 4304 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

June 9, 2020 /s/Laura E.B. Lombardi
Laura E.B. Lombardi

CERTIFICATE OF SERVICE

I, Laura Lombardi, hereby certify that a copy of DCYF's brief shall be served on Kevin P. Chisholm, Esq. (counsel for B.B.'s father), and John F. Driscoll, Esq. (counsel for B.B.'s guardians) through the New Hampshire Supreme Court's electronic filing system, and shall be conventionally served on Kailyn Provencal.

June 9, 2020 /s/ Laura E. B. Lombardi
Laura E.B. Lombardi

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